Petition

81-608

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No. _____

Supreme Court of the United States

October Term 1981

Audrey C.S. Schlesinger, Petitioner

v.

Lawrence E. Schlesinger, Respondent

On Petition for Writ of Certiorari to the Court of Appeals of Maryland and Court of Special Appeals of Maryland

---

PETITION FOR A WRIT OF CERTIORARI

Edward L. Genn
9 North Adams Street
Rockville, Maryland 20850
(301) 424-8400
Counsel of Record for
Petitioner

September 26, 1981

QUESTIONS PRESENTED

Whether the right of a civil litigant to be present and participate at any final proceeding adjudicating civil damages against, or a recovery by, that litigant is so constitutionally impacted, that the illness or hospitalization of that party on the eve of trial, constitutionally and not merely as a matter of discretion, prohibits the trial and determination of those rights except in unusual circumstances where there is no other available or less restrictive alternative.

LISTING OF PARTIES

The petitioner is Audrey C.S. Krash Schlesinger, c/o 8618 20th Avenue, Adelphi, Maryland 20783. The respondent is Lawrence E. Schlesinger of South Orleans, Massachusetts.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Audrey C.S. Schlesinger, respectfully prays that a writ of certiorari issue to review the judgments of the Court of Appeals of Maryland denying a petition for writ of certiorari in that court and thereby leaving in force and effect the decision of the Court of Special Appeals at issue herein. The grounds and bases of the Petition hereafter appear.

OPINIONS BELOW

On June 29, 1981 the Court of Appeals of Maryland denied a timely petition that sought review of the Court of Special Appeals decision here at issue (Petition Appendix 1).

That Court of Special Appeals decision was filed on March 17, 1981 and its reconsideration thereafter denied (Petition Appendix 2-10).*/

The trial court's rulings that denied Petitioner's presence at the trial on April 10, 1980, by refusing her requests for deferral or postponement due to illness and hospitalization, were by an order of April 7 and oral ruling of April 10, 1980, each of which is in the Appendix. (Pet.Apx. 11; 28-31).

Ignoring her doctor's statement on the first request and the hospital report thereafter, these trial rulings had the effect

*/ The pertinent part of that decision is at Pet.Apx. 3-4, 8.

of depriving her of presence and participation in the trial involving damage, dollar reimbursement and other claims with the Respondent, and her own dollar set-offs to those claims so that a money judgment was rendered against her.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved is the Fourteenth Amendment of the Constitution of the United States, and in particular its due process and equal protection provisions duly set forth in the Appendix (Pet.Apx. 40). The ruling at issue referred to Maryland Rule 527. While it is not essential to one theory of the cause to consider it for purposes of the primary constitutional questions raised, still, since it is urged that if applied to this cause, it is an unconstitutional rule,

it is set forth in the Appendix. (Pet.Apx.41-45)

STATEMENT OF THE CASE

On July 16, 1976, the husband Respondent, Lawrence E. Schlesinger, filed a Bill of Complaint in the Circuit Court for Montgomery County, later amended, for sale of both the house and property at 7612 Rosdhu Court, Chevy Chase, Maryland "in lieu of partition;" and for reimbursement of the monies here at issue. The then-wife, Petitioner herein, answered and counterclaimed. A trustee was appointed and after various proceedings the house was sold and certain proceeds held by the trustee. Some were partially distributed. The wife's counterclaim as such was denied, but she was permitted to make claims against the fund.

In late October of 1979, a Motion for Partial Summary Judgment was filed and later denied in large part. By that time, the parties were finally divorced. With that, the claims in the case at that time were claims of the Petitioner for set-offs and credits to

monies sought by the Respondent husband for mortgages, taxes, insurance and other sums; and he prayed a money judgment on them.

This ruling was followed by a Motion for Continuance, with medical reports attached, filed by the wife on March 31, 1980, seeking a deferral of the April 10 trial date because of her physical and mental condition.

In that Motion, the wife, requesting a continuance of the trial date of April 10 to the first available date in late July "or early August", and to extend the time for fulfilling discovery orders, stated this (Pet. Apx. 12-14):

> As counsel indicated to the Court at the recent hearing on the Motion to Compel and Exceptions, it appeared that the defendant was having significant difficulties; and as indicated in the Motion recently filed relating to those matters, this counsel received further information of a more specific nature. Thereafter and on Thursday, March 27, counsel received a medical statement from Dr. Robert Watson written the previous day, a copy of which is attached. Counsel called Dr. Watson concerning what was meant by the statement in the second to the last paragraph as to the extent of Mrs. Schlesinger's

capacity to participate at all and what was meant by an opinion that she should not have any more than minimum legal responsibilities for a two-month period as that statement would relate to an upcoming trial and the need to fulfill obligations to supply documents, answers to interrogatories and the like. Counsel was informed that Dr. Watson was out but would return Monday, March 31. On that date communication was had with Dr. Watson who supplied counsel with the attached letter that makes clear the absolute necessity for a continuance of the cause and a stay of all proceedings. (emphasis added).

There have been no substantive discussions with Mrs. Schlesinger for some time, undoubtedly connected with this condition. Counsel was informed that the psychiatrist who was already treating her might supply additional data. It turns out that a call to his office resulted in information that he is away. However, given the nature and the clear statement of Dr. Watson, it would appear unnecessary for anything further to be submitted to the Court in this regard. The physical problems as well as the emotional overlay are clear and stated in the medical report of March 31, 1980 attached hereto.

* * *

In view of the fact that the report indicates there should be no involvement by Mrs. Schlesinger for at least 60-90 days, and the need thereafter for some time to prepare for trial and for Mrs. Schlesinger's response to outstanding discovery, the period at the end of July or early August would appear to be

an appropriate time to schedule the cause for trial." (Pet.Apx. 14, emphasis added).

The medical statements from Dr. Watson at that time -- all undisputed -- stated the following: That she was being tested for "chronic pain syndrome"; that she had a "rather involved medical history for which she has sought orthopedic, neurosurgery and psychiatric care"; that Dr. Watson, a military doctor interested in chronic pain cases, had embarked on a course of outpatient treatment including regularly scheduled psychiatric support which, "for optimal results should not be broken until the series is complete," and required weekly visits; further, as he noted in the second to last paragraph of his first report of March 26, she should have "only minimal legal responsibilities during these next two months". (Pet. Apx. 15-16; E.171-172).

When Dr. Watson was asked to explain his latter statement and other matters in his opinion, he did so in a letter of March 31,

noting this (Pet. Apx. 17):

> "After re-reading the letter of 26 March 1980 regarding my treatment of Mrs. Schlesinger, I can understand your concern regarding her inability to fully participate in important legal matters during the course of her current treatment.
>
> The next to last paragraph on page 2 of the above letter, although clear to me as her physician, requires enlargement to more fully disclose to you the medical considerations hampering her ability to even minimally participate in legal matters during her treatment." (emphasis added).

He then described what was done in greater detail and its possible effects and risks (Pet.Apx. 18;E.170):

> "During the time that she is receiving the above high risk, weekly injections we will be trying to reduce her dependence on oral analgesics and will be trying to adjust her anti-inflammatory non-steriodal (non-cortisone) drugs to the pro-analgesics; and application of new drugs with certain side effects produces an emotionally charged situation requiring the physician to separate what is drug side effect from drug withdrawal and situational anxiety over this new direction in therapy.
>
> To add emotionally upsetting legal problems requiring responsible actions by the patient to those she is already experiencing with her current therapy, could cause her current treatment to

> fail. Adequate rest and being able to cope with treatment changes are essential to success of her current treatment.
>
> It is also my medical opinion that if Court dates were not broken by possible hospital admissions for complications mentioned above, then it would also be likely that actions taken by her during her altered emotional state would be less than responsible." (emphasis added).

He then concluded that it was essential "to delay for at least 60-90 days any legal matters that would require responsible actions on her part" and that "she should not participate in legal matters during this period." (Pet.Apx. 19;E.171).

The hearing on this Motion was held Monday, April 7, the earliest available date. The Motion was denied. (Pet.Apx. 11).

Three days later trial began. On the night before the trial Mrs. Schlesinger was hospitalized by Dr. Melnick for dehydration, reflected in a hospital report given counsel that morning, which showed her admission at 4:45 p.m. the previous

day, April 9 (Pet.Apx. 39). An oral Motion made at the opening of the trial to allow for her presence or participation or deferral of her testimony was denied. (Pet. Apx. 32-37; E.413-414, 421-43).

The Respondent, Mr. Schlesinger, was therefore the only witness.

He produced various exhibits summarizing what he asserted were the purchase, mortgage, insurance, tax and repair payments that served as the basis of his reimbursement and lien claims.

The court granted a judgment and order for the sums requested by the Respondent former husband and issued its Order in the form he requested, including allocation of the Trustee's expenses (Pet.Apx. 20-23).

It also ordered forthwith disbursement which was stayed when the wife filed a $25,000.00 supersedeas bond (about equal to the remaining sum due her if the Order were not appealed) (E.182-183).

Various exhibits were offered by the wife's counsel to support her defenses and credits, and largely rejected. Had the wife, Mrs. Schlesinger, been present, she would have been able to supply directly through testimony support for her claims of agreed pooled resources, family expense set-offs, reduced value set-offs and her personal contributions. That would have resulted in the elimination of all sums granted the former husband. These involved, almost entirely, events and understandings solely between the parties.*/

At the hearing on the first request for continuance, based on Doctor Watson's statements and the matters in the above-stated Motion, the trial court denied the Motion without more claiming that the treatment was "elective", and this because its arthritic secretary was a good example of what people can live with. (Pet.Apx. 28-30; E.399,407).

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*/ Of course, the critical constitutional point involves far more than testimony.

That court ignored the already-noted fact that, because of her stated condition described by Dr. Watson, there had been "no substantial discussions" with Mrs. Schlesinger and she had been unable to prepare her discovery or attend to the case (Pet. Apx. 13); and it ignored the only medical opinion before it, in that Dr. Watson found her chronic pain condition such that it was essential "to delay for at least 60-90 days any legal matters that would require responsible actions on her part" and that "she should not participate in legal matters during this period." (Pet.Apx. 19; E.179).

In this regard, the appellate court evidently saw that the trial court's reliance on its arthritic secretary as a reason to find "elective" treatment, and its substitution of personal views for clear medical evidence without anything contrary, was improper. Thus, it rested its

affirmance on the absence of an affidavit under Maryland Rule 527(c), a rule dealing with absent witnesses and set forth in the Appendix (Pet.Apx. 41-45).*/

The sketchy facts in the Court of Special Appeals reflect that there were two separate requests for a continuance, but not how each rose or the grounds urged or employed for each denial.

At the hearing on the first request (filed on March 31, 1980, ten (10) days before trial and heard on April 7, three (3) days before the trial), no reference was made to any "affidavit". As it will turn out (a) that absence is immaterial to our point; (b) could not have been complied with; (c) irrespective of why it does not apply to parties by its terms, it has no relation to the constitutional issue of a party's right of presence and/or participation in a civil trial.

*/ The critical parts were amended in 1981 after trial. Both versions are in the Appendix at 41-42 and 43-44. Both confirm our points hereafter.

The second request arose from the already-noted fact that on the night before trial, and after the denial of the first request, Mrs. Schlesinger was hospitalized by Dr. Melnick for dehydration, reflected in a hospital report given counsel on the very morning of trial, which showed her admission at 4:45 p.m. the previous, day (Pet.Apx. 39,32; 39(a) for original of copy

Only at this time, on the day of the trial was there any reference to a Maryland Rule 527(c) affidavit by the lower court. (Pet.Apx. 37 - 38).

The time factors at that time alone, however, showed the inability of counsel to obtain any affidavit, even if contrary to everything that appears in Rule 527(c)(2), 527(c)(1) does apply to a party as against other witnesses. (Pet.Apx. 42-44 show the contents in Rule 527(c)(2)).

The verification of the Petitioner's hospital was readily at hand by telephone and evidently not denied.

Further, Dr. Melnick was unavailable, and he was to call the court, as noted in counsel's statement when trial began that morning (Pet.Apx. 34-35).

Worse, it even appears that he did so, but that not until the trial was over and the ruling made, did it appear that that day the Court's Clerk completely failed to notify counsel of the call. There is no indication by the Court, when that fact was presented to it in "objections" to the final order, why it was not done or whether it knew of the call. (Pet. Apx. 24, 26).

Neither the trial court nor appellate court distinguished between witnesses and parties, giving no consideration to the critical, constitutional points urged throughout: that a party has a right to be present even without regard to expected testimony; simply to assist in, or to meet or to hear a sudden question or address new issues

arising at trial, the litigant has that right; and a rule or ruling or state interpretation of a rule (whether right or wrong) that equates the need for an affidavit regarding an absent witness's testimony (as here), with a party's rights, wholly ignores the fundamental participation right of a party; and no rule, such as the one here (addressing the materiality of the evidence or the like) should be able to override it. That participation right, we urged, was constitutionally based. Maryland ignores it and has equated the two in its rule. We urged that that was not a proper recognition of the right. We did so, wholly aside from the fact that the rule was impossible of fulfillment here (if one considers the time available and what was to be in the affidavit). We noted that if it is to be applied, the requirement of a less drastic alternative than prohibition of presence must be afforded, e.g.,

deferral of her testimony, time to provide an affidavit and the like. The argument was that the state and federal constitution required either or both.

All these contentions were rejected.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

This Court should issue the Writ on the Petition to determine when an ill or hospitalized litigant is deprived of due process and equal protection of the laws in a civil case where that litigant is, by court ruling or rule, prohibited from being present at and participating in a legal proceeding that will adjudicate and determine monies that that litigant will lose if the case proceeds in her absence as a party.

The issue urged to be heard is not about discretionary power, clearly a state matter.

It is about the constitutionally permissible.

It is an issue that arises commonly but has surprisingly little definitive discussion as a constitutional matter.

It is not about how the issue is generally resolved in both the state and federal appellate courts.

There the books are replete with cases holding that, given the law's general inclination to favor a full trial with both sides present, the denial of a continuance to an ill or hospitalized litigant is generally an abuse of discretion, in the absence of compelling facts warranting the denial and prejudice to the opposing party shown. Further, those cases frequently reject as significant the need to present affidavits, and require a reasonable opportunity to have a full hearing on the matter if the medical statements are in question or there is doubt about the actuality of the illness or hospitalizations. Certain examples of those cases, which employ the "abuse of discretion" grounds without reaching our issue --- the constitutionally permissible --- while

still using language not dissimilar to that properly employed for "constitutional" standards and determinations, are these:

Latham v. Crofters, 492 F.2d 913 (4th Cir. 1974) (on the day of trial in a case pending 20 months, where a stipulation as to the litigant's testimony was offered, denial was an "abuse of discretion" where there was a history of a heart condition and no opportunity to that person "to substantiate the claim by additional proof", 492 F.2d at 915);

Gaspar v. Kassm, 493 F.2d 964 (3rd Cir. 1974) (trial in 1973 involving an automobile accident in 1967 on a complaint filed in 1969; claim of "aged case" by the trial judge, 493 F.2d at 966; only vague statements of illness provided; the Court noted that ". . .it is customary to grant a continuance on the ground of illness of a party", 493 F.2d at 969);

Arrington v. Robertson, 114 F.2d 821

(3rd Cir. 1940) a leading case;

Krull v. Krull, (Pa. Super.) 344 A.2d 619 (1975) (support action; the rules on "continuances" cannot disregard the clear "cherished right" that is the basis for the local rules; no showing of feigning and if claimed, time for a hearing on that should be allowed; the Court clearly distinguished between a party's right to be present and the issue of testimonial need);

Pollard v. Walsh, ____ Colo. _____ 575 P.2d 411 (1978) (failure to permit participation by denying a continuance to an ill litigant is generally an abuse of discretion, while reasonable conditions or alternatives can be imposed);

Westfall v. Motors Insurance Corporation, 136 Mont. 499, 348 P.2d 784 (1960) (absent witness affidavit requirement not necessary for a party litigant because he has a right to be present without regard to testimony);

Cf. Moll v. Moll, 231 N.W.2d 769 (1975) (divorce action; rule grounded in constitution, no medical evidence presented, court stating even a telephone call from a doctor with first hand information that a litigant is ill or incapacity, should suffice and would have sufficed, 231 N.W.2d at 772.)

As noted in Arrington supra, this court long ago made clear that "essential to the proper protection of the right to be heard" is the right of a civil litigant to be present whenever any critical event is to occur in a case affecting that litigant's rights. See Fillippon v. Albion Vein State Co., 250 U.S. 76, 81, 39 S.Ct. 435, 436 (1919), involving merely a judge's reply to jury inquiries in the absence of the complaining litigant or counsel, and noted in Arrington, 114 F.2d at 882.

Of course it was settled long before Fillipon that due process is offended when

a defendant is not present at every stage. See Hopt v. Utah, 110 U.S. 574, 4 S.Ct. 202 (1894). As Arrington noted, "(o)rderly procedure requires that a plaintiff (or civil litigant) be accorded the same right", 114 F.2d at 823.

This was noted in the context of an ill litigant in that case.

In Mullane v. Central Hanover Bank and Trust, 339 U.S. 306, 70 S.Ct. 652 (1949), this Court further expanded on what is meant by the right to be "heard."

Since then, a series of related decisions have stressed varying aspects of that critical right, and how it may be limited. Cf. Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780 (1971). United States v. Sumitomo Marine and Fire Ins. Co., 617 F.2d 1365 (9th Cir. 1980). For the ill or hospitalized, a denial of a continuance amounts to denial of meaningful access, or an unconstitutionally harsh sanction for that which

affects all, but in varying degrees. Furthermore, the issue is not merely that; but a meaningful opportunity to be heard on the issue of illness itself if that is challenged. Compare Goss v. Lopez 419 U.S. 565, 95 S.Ct. 729 (1975) and Fuentes v. Shevin, 407 U.S. 671, 92 S.Ct. 1983 (1972). In this case, that too was not afforded. And, these constitutional matters cannot be improperly limited by a mere rule. See Goss, Mullane.

In spite of this law, what has not been addressed is the extent to which the ill or hospitalized litigant has a due process or equal protection right that cannot be overridden by local standards, or interpretation of rules, except in exceptional cases, narrowly confined.

As noted in the above-cited authorities, the appellate courts have generally spoken in words most usually found in constitutional determinations --- "cherished" rights, fundamental requirements, the basic,

and the like --- and yet treated the matter of a denial of a continuance to the ill as a question of customary practice or abused discretion.

For the ill or hospitalized litigant, unlike the healthy litigant with an absent witness, the denial of "a continuance" is far more than that. It is a denial of presence and participation in a matter adjudicating that litigant's critical rights.

That the condition here described -- the ill or recently hospitalized litigant -- is a common occurrence, cannot be denied.

It seems equally clear that the cases generally --- and statements from this Court on what is a constitutionally permissible prohibition or standard for denial of a litigant's trial presence and participation --- are surprisingly scant or non-existent. Cf. Arrington, supra.

The problem is that the states, as here, have generally treated the litigant simply as another witness; required, as here, an affidavit about what will be testified to, when that litigant's right goes far beyond merely giving testimony; substituted, as here, a standard of discretion at the appellate level or compliance with a local rule for witnesses, with a constitutional right; and finally, as here, failed to apply the constitutionally "least restrictive alternative" in limiting the constitutional right. Cf. for the latter, Shelton v. Tucker 364 U.S. 479, 81 S.Ct. 247 (1960) and United States v. Robel, 389 U.S. 288, 88 S.Ct. 419 (1967).

The postponement of Petitioner's defense was that relief, particularly since the only prejudice to Respondent was loss of interest on the fund at issue, a clearly compensable "prejudice", and thus not of legal significance.

Our issues and those they encompass are plainly framed in this record.

The desirable deference of this Court to the states, in their own determinations of the usual case, properly has a compelling reverse side: state rules and rulings that do not properly recognize the right of participation and presence of a civil litigant as something more than a matter of discretion, or of the testimonial importance of the party, violate constitutional demands.

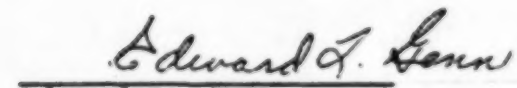
The area of the constitutionally allowable or permissible; the occasions and standards by which that may be done to a frequent litigant --- the ill or the hospitalized --- needs definition and precision.

Maryland, as with most states, has implied that there are constitutional limits, but not found any, treating its cases as an issue of abused discretion. See Thanos v. Mitchell, 220 Md. 389, 152 A.2d 833 (1959); In re McNeil, 21 Md.App. 434, 320

A.2d 57 (1974). Its errors in this regard are violative of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, the Petition should be granted and the writ issued.



Edward L. Genn
9 North Adams Street
Rockville, Maryland 20850
(301) 424-8400 or
638-2027
Counsel of Record for
Petitioner

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AUDREY C.S. SCHLESINGER	)	In the
	)	Court of Appeals
	)	of Maryland
	)	
	)	Petition Docket
	)	No. 141
	)	
v.	)	September Term,
	)	1981
	)	
	)	(No. 915, Septem-
	)	ber Term, 1980
	)	Court of Special
LAWRENCE E. SCHLESINGER	)	Appeals)

FILED JUNE 29, 1981

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answered filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: June 29, 1981

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 915,

September Term, 1980

AUDREY C. S. SCHLESINGER

-v-

LAWRENCE E. SCHLESINGER

Gilbert, C.J.
Thompson,
Weant,
JJ.

PER CURIAM

Filed: March 17, 1981

On 30 April 1973, almost five months prior to their marriage, Lawrence E. Schlesinger and Audrey C. S. Krash purchased as tenants in common certain real property located at 7612 Rosdhu Court, Chevy Chase, Maryland. Lawrence and Audrey lived together at the above address until Audrey Schlesinger, the appellant herein, left home on 30 November 1975. Thereafter, on 16 July 1976, the appellee Lawrence Schlesinger filed a bill of complaint in the Circuit Court for Montgomery County; by this bill Mr. Schlesinger sought a sale of 7612 Rosdhu Court in lieu of partition. Then, on 3 November 1976, the appellee, in response to various other pleadings, which included a counterclaim and a demurrer thereto, filed an amended bill of complaint whereby he sought, in addition to the sale of the subject property, contribution from Audrey Schlesinger for one-half of all expenses paid by him, including payments toward the property's deed of trust, as well as payments for taxes, insurance, and repairs. While it agreed to a sale of the premises, the appellant's answer to the amended bill contested the additional claims set forth therein and reiterated various contentions that she had previously raised in her counterclaim. A demurrer to this earlier-raised counterclaim was sustained on 8 February 1977 with leave to amend. Then, on 10 March 1977, the trial court ordered the sale of the subject property and appointed a trustee for that purpose. Also occurring on this same date was the filing by the appellant of an amended counterclaim; this action ultimately extracted from the appellee a motion ne recipiatur, which motion was granted by order dated 29 September 1977. The sale of the property was ratified by an order dated 15 March

1978; this order was appealed by Mrs. Schlesinger, which appeal was dismissed by this Court on 23 August 1978.

After more legal maneuvering, the matter of the distribution of the sale proceeds was set for trial for 10 April 1980. On 31 March 1980, the appellant filed a motion for a continuance of this trial date. After a hearing on the motion, at which the appellant produced no evidence, relying instead on argument and two doctors' letters that were filed with her motion, the trial court denied same on 7 April 1980. Thereafter, on the day of trial, the appellant again renewed the motion for continuance, which was likewise denied.

Lawrence Schlesinger was the only witness at the April 10th trial. He testified in support of his claims for contributions and as an adverse witness for the appellant regarding her claims. In testifying as to why the parties took the property as tenants in common, Mr. Schlesinger explained that this was done on the advice of counsel. Said advice was premised on the fact that the appellee had been divorced before and that so holding the property would best represent the financial interests of the parties.

In an effort to sustain her claim for damages due to ouster and waste, the appellant called the appellee as an adverse witness. In explaining the ouster allegation Mr. Schlesinger testified that he had changed the locks on the house in the early spring of 1976 because "Mrs. Schlesinger had entered the house on a number of occasions and damaged things, broke things, let the dogs out and it created a condition so that I didn't feel I had security." In

response to the charge of waste, Mr. Schlesinger said that he attempted to have the roof repaired in 1977 and that he did a lot of work in the yard, cleaning up leaves, weeds, underbrush, and the rocks and paths. He further claimed that he had vacuumed the property.

The court's final order, which was filed on 12 May 1980, dismissed the "Defendant's Petition for Order Adjudicating and Declaring sums of Proceeds owing and Directing the Retention by the Trustee until Final Hearing and for Other Relief and the Defendant's Amended and Supplemental Answer to Amended Bill insofar as it requests affirmative relief." It further imposed an equitable lien against the appellant's interest in the proceeds from the sale of the property in question in the amount of Twenty-five Thousand, Five Hundred, Thirty-three Dollars and Ninety-three Cents ($25,533.93). From this order Audrey Schlesinger has appealed. Although the appellee filed a cross-appeal he has not pursued it in this Court.

In her appellate brief, Mrs. Schlesinger has set forth eight discursive statements as being "Questions Presented." However, under her section entitled "Argument" she has set forth five somewhat less desultory divisions as follows:

I. The Trial Court Erred in Granting the Motion Ne Recipiatur Striking the Amended Counterclaim, Particularly with Respect to the Property Claims, Declaratory Relief, and an Accounting.

II. The Trial Court Erred in Striking the Ouster Claims in its Partial Summary Rulings on Damages for Use of Premises and Property.

III. The Trial Court Committed Reversible Error in Failing to Grant the Continuance Requests of the Wife.

IV. The Trial Court Erred in Failing to Apply the Proper Standards, Principles or Presumptions to its Determination of Reimbursements, Credits and the Equitable Lien Granted the Husband; and in Failing to Grant the Wife Equitable Setoffs.

V. The Trial Court Erred in Evidentiary Rulings, Particularly in Regard to Hearsay Testimony as to What his Attorney Told Him to Do, Best Evidence as to Sums Advanced; and Admissibility of Reimbursement Evidence and the Wife's Exhibits.

I.

The appellant here expresses her aggrievment at the trial court's action in eliminating her amended counterclaim. In particular we gather that this complaint is bottomed on the outcome of another appeal, No. 1646, September Term, 1979, which is presently pending in this Court. As set forth in the order of the trial court and the amended counterclaim, the questions involved are ones of trover or replevin relating to the personalty claimed by the

appellant. Because the instant case relates only to the real property, we fail to see how the court erred in its action.

In passing, we note our belief that Mrs. Schlesinger's reliance on Lusby v. Lusby, 283 Md. 334 (1978) is ill-founded as that case holds that a wife may sue her husband for damages under facts and circumstances amounting to "an outrageous, intentional tort," id. at 335, whereas in this case, the appellant is attempting to recover either personal property or damages therefor.

The other allegations of error on the part of the trial court are based, if at all, on bald allegations of law which do not persuade us that the actions of that forum, couched as they were in cogent explanations, were improper.

II.

Here again the appellant has hauled out the unloaded legal shotgun. She attempts to rely on Young v. Young, 37 Md. App. 211. cert. denied, 281 Md. 746 (1977), wherein the finding of ouster was based on the uncontradicted testimony that the wife was forced to leave the marital abode because of the husband's vicious conduct. In our case the uncontradicted evidence warrants the trial court's contrary finding of no ouster, in that

> (t)he evidence (was) that Mrs. Schlesinger left the premises, the marital premises, on November 30, 1975, and the only time she ever came back was to get in the house to commit waste herself. She never came back, nor ever asked to be

> allowed to return. She never came back for the purpose of living there. She never asked for permission to come back and live there. The only reason that the - - we find from the evidence that Dr. Schlesinger did change the locks on the house was to prevent her from committing waste in the premises.

Accordingly, allegation II has no merit.

III.

Next the appellant is found to complain because of the failure of the court to grant a continuance of a hearing in a trial that was several years old, and which hearing date of 10 April 1980 had been set as early as 19 October 1979.

Rule 527 of the Maryland Rules of Procedure covering continuances or postponements provides in part in paragraph c, "Absent Witness":

> 1. Motion for Continuance -- Affidavit.
>
> A motion for a continuance or postponement on the ground that the evidence of an absent witness is wanting must be supported by an affidavit of the party making the application or of some other credible person.

The simply answer to contention III is that the above-mentioned provision was not complied with.

Despite the appellant's intrepid allegation that the trial court erred in "Failing to Apply the Proper Standards,

Principles or Presumption to its Determination of Reimbursements, Credits and the Equitable Lian Granted the Husband; and in Failing to Grant (Her) Equitable Setoffs," our review of the record finds no such errors; nor are we persuaded by the appellant's claims that the court erred either in the law or its discretion. Here again our response to the appellant's argument is in the negative.

V.

Mrs. Schlesinger's contention in this regard amounts to, "(a)t the trial, the Court clearly erred in certain evidentiary issues, two of which would arise on retrial." There is appended to this a footnote.

The gravamen, if any of this argument appears to be that the appellant wants another bite at the apple in order to more properly present her case. There is an effort to sustain this contention through the allegation that the testimony concerning the advice of the appellee's attorney was improperly admitted as hearsay. In our view such is not the case as the advice of the attorney to acquire the title to the property in question as tenants in common was offered as the motivation and reason for this action rather than for the truth of the matter asserted and hence is not hearsay. Dennett v. State, 19 Md.App. 376, 385 (1973), cert. denied, 271 Md. 734 (1974). Again we find no merit in the appellant's claim of error on the part of the trial court.

JUDGMENT AFFIRMED.
COSTS TO BE PAID BY THE APPELLANT.

COURT OF SPECIAL APPEALS
OF MARYLAND
Annapolis, Md. 21401

April 28, 1981

Edward L. Genn, Esq.
9 No. Adams Street
Rockville, Maryland 20850

Re: Audrey C.S. Schlesinger v. Lawrence E. Schlesinger, No. 915, Sept. Term, 1980

Dear Mr. Genn:

Please be advised that your Motion for Reconsideration was presented, considered and denied by the Panel on April 27, 1981. A copy of the mandate, issued today, is enclosed and the record is being returned to the Circuit Court for Montgomery County.

Very truly yours,

Howard E. Friedman
Clerk

HEF/nze
cc: Clerk, Circuit Court for Montgomery Co.
Bryan Renehan, Esq.
Enclosure

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, MARYLAND
Sitting as a Court of Equity

LAWRENCE E. SCHLESINGER, Plaintiff,	)	
vs.	)	Equity No. 56422
AUDREY C. S. SCHLESINGER, Defendant.	)	

O R D E R

Upon consideration of the Defendant's Motion for Continuance of Trial Date and argument of counsel, it is, by the Circuit Court for Montgomery County, Maryland, Sitting as a Court of Equity, this 7th day of April, 1980

ORDERED, that the Defendant's Motion for Continuance of Trial Date is denied.

Judge Joseph M. Mathias
Montgomery County Circuit
Court

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, MARYLAND

Sitting as a Court of Equity

LAWRENCE E. SCHLESINGER	)	
	)	
Plaintiff	)	
	)	
v.	)	Equity No. 56422
	)	
AUDREY C. S. SCHLESINGER	)	Filed March 31,
	)	1980
Defendant	)	

MOTION FOR CONTINUANCE OF TRIAL DATE, FOR ORDER EXTENDING TIME FOR DISCOVERY RESPONSES, STAY OF DISCOVERY PROCEEDINGS, AND OTHER RELIEF

Comes now the Defendant Audrey C. S. Schlesinger and moves this Court to continue the trial date of this cause scheduled to begin April 10, 1980 to the first available date or the latter part of July or early August, and to extend the time for discovery responses pursuant to the Court's orders and for a stay of discovery proceedings on the following grounds: As counsel indicated to the Court at the recent hearing on the Motion to Compel and Exceptions, it appeared that the Defendant was having significant difficulties; and as indicated in the Motion recently filed relating to those matters, this counsel received further information of a more specific nature. Thereafter and on Thursday, March 27, counsel received a medical statement from Dr. Robert Watson written the previous day, a copy of which is attached. Counsel called Dr. Watson concerning what was meant by the

statement in the second to the last paragraph as to the extent of Mrs. Schlesinger's capacity to participate at all and what was meant by an opinion that she should not have any more than minimum legal responsibilities for a two-month period as that statement would relate to an upcoming trial and the need to fulfill obligations to supply documents, answers to interrogatories and the like. Counsel was informed that Dr. Watson was out but would return Monday, March 31. On that date communication was had with Dr. Watson who supplied counsel with the attached letter that makes clear the absolute necessity for a continuance of the cause and a stay of all proceedings.

There have been no substantive discussions with Mrs. Schlesinger for some time, undoubtedly connected with this condition. Counsel was informed that the psychiatrist who was already treating her might supply additional data. It turns out that a call to his office resulted in information that he is away. However, given the nature and the clear statement of Dr. Watson, it would appear unnecessary for anything further to be submitted to the Court in this regard. The physical problems as well as the emotional overlay are clear and stated in the medical report of March 31, 1980 attached hereto.

No useful purpose would be served in further response to the opposition of the plaintiff, which evidences an insensitivity to what had been stated at the hearing. It might also be noted that when the first report was received on March 27, this counsel called Mr. Renehan. He raised some questions that appear to indicate a lack of understanding as to the severity of the matter. For that additional reason, counsel made inquiry of Dr. Watson to

clarify what his opinion was.

In view of the fact that the report indicates there should be no involvement by Mrs. Schlesinger for at least 60-90 days, and the need thereafter for some time to prepare for trial and for Mrs. Schlesinger's response to outstanding discovery, the period at the end of July or early August would appear to be an appropriate time to schedule the cause for trial.

WHEREFORE the premises considered and on the basis of the medical statements befor the Court, Defendant by counsel prays that this Court enter an Order continuing the cause to a date to be supplied by the Assignment Commissioner, and it further extend the time for further discovery requests, stay the discovery in accordance with the proposed Order, and grant such other relief as is appropriate.

Hearing is requested if the Motion is opposed.

Edward L. Genn
9 North Adams Street
Rockville, Maryland 20850
424-8400 or 638-2027
Attorney for Defendant
Audrey C.S. Schlesinger

The medical statements herein.

HSWP-SAO 26 March 1980

Mr. Edward L. Genn
Attorney at Law
9 North Adams
Rockville, Maryland

Dear Mr. Genn:

I am writing to advise you that Mrs. Audrey Schlesinger has been under my medical care for the past two weeks having been referred by Dr. Joseph Wohlman. Although she is not authorized Military Medical Care I have undertaken to treat her because of my interest and experience in treating patients with chronic pain syndromes.

As you probably know, Mrs. Schlesinger has a rather involved medical history for which she has sought orthopedic, neurosurgery and psychiatric care.

During the past few years surgical procedures, medical devices and various drug treatment regimens have been incapable of relieving her pain related to her upper right extremity, right breast, low back and right lower extremity.

Mrs. Schlesinger's radicular symptoms involving her right upper extremity with radiological evidence of cervical spondylolethis, demonstrate evidence of moderately severe osteoarthritis.

Presently she is being treated once every 5-10 days with the percutaneous cervical epidural administration of cortisone (Depomedrol) mixed with local anesthetics. This will continue for 3-4 treatments or until improvement is noted. She is to continue with the concurrent oral use of

non-steroidal analgesics (Clinoril) and with regularly scheduled psychiatric support.

This treatment regimen for optimal results should not be broken until the series is complete. This will require at least one weekly visit to the hospital for the next four weeks for an admission of about six hours duration.

At the termination of this treatment, follow-up care will be delivered by Dr. George Morales in the Pain Control Clinic at George Washington University. Dr. Morales was contacted this morning regarding the transfer to his care, however due to his being away until 14 April the transfer in care cannot be completed.

It would be in Mrs. Schlesinger's best medical interests if she had only minimal legal responsibilities during this next two months period so that she can complete the treatment regimen prescribed above.

If you need to contact me for further details my telephone number is 576-1471-2 or 576-3890-1.

Sincerely,

ROBERT L. WATSON, M.D.
COL, MC, USA
Chief, Anesthesia and
Operative Services

HSWP-SAO 31 March 1980

Mr. Edward L. Genn
Attorney at Law
9 North Adams
Rockville, Maryland

Dear Mr. Genn:

Thank you for your telephone call this morning relating to the care of Mrs. Audrey Schlesinger.

After re-reading the letter of 26 March 1980 regarding my treatment of Mrs. Schlesinger, I can understand your concern regarding her inability to fully participate in important legal matters during the course of her current treatment.

The next to last paragraph on page 2 of the above letter, although clear to me as her physician, requires enlargement to more fully disclose to you the medical considerations hampering her ability to even minimally participate in legal matters during her treatment.

One portion of her treatment, as it relates to bringing under control the cervical radicular (nerve root entrapment) pain related to arthritis associated with cervical spondolythesis requires a weekly injection of a cortisone compound into the epidural space of the neck surrounding the spinal cord. This area is within a millimeter or less of the subarachnoid space, which contains the spinal fluid, and if entered inadvertently by the epidural needle while performing her weekly procedure a loss of spinal fluid would occur leading to a spinal headache which, in addition to being

terribly debilitating with nausea, vomiting, etc., could cause her formal admission to the hospital for four days or more.

The complication of a spinal headache is one of the numerous risks associated with her weekly epidural injections which must be assumed and found acceptable to the patient, Mrs. Schlesinger. Other risks include: epidural hematoma, paralysis, meningitis, meningismus, and cervical neck pain.

During the time that she is receiving the above high risk, weekly injections we will be trying to reduce her dependence on oral analgesics and will be trying to adjust her anti-inflammatory non-steroidal (non-cortisone) drugs to the proper drug and dose. Withdrawal from certain analgesics and application of new drugs with certain side effects produces an emotionally charged situation requiring the physician to separate what is drug side effect from drug withdrawal and situational anxiety over this new direction in therapy.

To add emotionally upsetting legal problems requiring responsible actions by the patient to those she is already experiencing with her current therapy, could cause her current treatment to fail. Adequate rest and being able to cope with treatment changes are essential to success of her current treatment.

It is also my medical opinion that if Court dates were not broken by possible hospital admissions for complications mentioned above, then it would also be likely that actions taken by her during her altered emotional state would be less than responsible.

Because of the above problems associated with Mrs. Schlesinger's treatment and the need to get this lady into a definitive treatment regimen that will resolve some of her medical problems of the past 4 years, I firmly believe that it would be in her best interests for her present and future physical and mental health to delay for at least 60-90 days any legal matters that would require responsible actions on her part. In other words she should not participate in legal matters during this period.

Sincerely,

ROBERT L. WATSON, M.D.
COL, MC, USA
Chief, Anesthesia and
Operative Services

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY
MARYLAND

Sitting as a Court of Equity

LAWRENCE E. SCHLESINGER :

Plaintiff :

v. : Equity No. 56422

AUDREY C.S. SCHLESINGER :

Defendant :

FILED MAY 12, 1980

FINAL ORDER

This matter having come on for trial on April 10, 1980, and testimony having been presented, it is, by the Circuit Court for Montgomery County, Maryland this 12th day of May 1980,

ORDERED, that the Defendant's Motion to Modify Order Compelling Discovery and Sustaining Exceptions with other Relief (Docket Entry #119) is denied; and it is further

ORDERED, that the Defendant, Audrey

Schlesinger, shall be charged with $2,325.00 of the additional compensation allowed to the trustee, Mark S. Goldstein, pursuant to this Court's Order of October 5, 1979, and the Plaintiff, Lawrence E. Schlesinger, shall be charged with $585.00, and the additional expenses in the amount of $130.78 shall be borne equally by the parties; and it is further

ORDERED, that an equitable lien is imposed upon the Defendant's interest in the proceeds from the sale of the real property, which is the subject matter of the case herein, in favor of the Plaintiff in the amount of $25,533.93, which figure is one-half of the total payments paid by the Plaintiff for the following items:

Excess contributions toward purchase of property (Plaintiff's Exhibit No. 2)	$9,828.80
Principal and interest payments on encumbrances (Plaintiff's Exhibit No. 3)	23,739.98

Real Estate taxes (Plaintiff's Exhibit No. 4)	$13,938.33
Insurance payments (Plaintiff's Exhibit No. 5)	1,858.75
Necessary repairs (Plaintiff's Exhibit No. 6)	1,702.00
	$51,067.86
divided by 2 =	$25,533.93

and it is further

ORDERED, that the Defendant's Petition For Order Adjudicating and Declaring Sums And Proceeds owing and Directing the Retention By the Trustee Until Final Hearing And For Other Relief (Docket Entry No. 63) and the Defendant's Amended And Supplemental Answer To Amended Bill, insofar as it requests affirmative relief (Docket Entry No. 97) are dismissed with prejudice; and it is further

ORDERED, that the trustee, Mark S. Goldstein, shall distribute the remaining

proceeds held by him forthwith in accordance with this Order.

Joseph M. Mathias
Judge of the Circuit Court
Montgomery County, Md.

cc: Edward L. Genn, Esq.
9 No. Adams Street
Rockville, Maryland 20850
HAND DELIVERED
May 7, 1980

(E174-175)

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY
MARYLAND
Sitting as a Court of Equity

LAWRENCE E. SCHLESINGER)
Plaintiff)
v.) Equity No. 56422
AUDREY C.S. SCHLESINGER)
Defendant)

OBJECTIONS TO PROPOSED FINAL ORDER
WITH MOTION TO SET ASIDE

For her objections to the final order, the Defendant states as follows:

1. With respect to the form of the order:

(a) On the second page, in its ordering part, the proposed order refers to pleadings that were already resolved, in substantial part, by demurrers and motions for summary judgment. Therefore the entire paragraph should be eliminated except to state as follows: "(it) is further ORDERED that, the Court having ruled

upon certain of the Defendant's claims including all personal property claims, ouster and credits for use; and having further excluded from consideration any claimed credits of the wife for tax credits or deductions taken by the husband for mortgage payments, insurance or taxes; and having further ruled that the same are not allowable credits, the Court allows all of the foregoing sums ($25,533.93) without such credits."

(b) The reference to "Motions to Continue" should be eliminated unless the basis thereof is stated. The motions before the Court were to continue the case because the Defendant was in the hospital, and for the other reasons stated at the prior hearing. Further, there was not sufficient time to obtain more than the document presented to the Court. The request made included a Motion that the cause be kept open for further evidence

from Mrs. Schlesinger. (It might be noted that during the afternoon session on April 10, the Court addressed the issue of a doctor's affidavit. In the record we pointed out inadequate time to obtain it. Even if it were required by the rule, the Court referred to (Rule 527) whose affidavit part seems to apply to witnesses and not the parties, there still was insufficient time. We are informed that the Court's law clerk did receive a message for a call to Dr. Melnick (the attending doctor). This counsel did not receive the message that that occurred until after the hearing. Since the proposed Order is in error with regard to what was requested on the "Motions to Continue" and is incomplete, it should be either stricken or fully stated.

* * * * *

(Balance omitted as irrelevant).

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY
MARYLAND

Sitting as a Court of Equity

LAWRENCE E. SCHLESSINGER

Plaintiff

v. Equity No. 56422

AUDREY C.S. SCHLESSINGER

Defendant

April 7, 1980

Rockville, Md.

* * *

P R O C E E D I N G S

THE CLERK: Equity number 56422, Schlessinger versus Schlessinger.

THE COURT: This case is set for trial on April 10, 1980, and I have a Motion for a Continuance of the trial date, which was filed on March 31, 1980 by the defendant, Audrey Schlessinger. It is your Motion, Mr. Genn.

MR. GENN: Your Honor --

THE COURT: I have read your written Motion, and it doesn't seem

to me that off-hand you should continue this case. It looks to me as if she is taking elective treatment at the hospital, and we have got priority here.

MR. GENN: Well, Your Honor, may I address that?

THE COURT: We have had this case scheduled for a long time. She is going in the hospital for this treatment, and she can elect to do it some other time.

* * *

THE COURT: I am going to rule on it.

This case has been pending I think for three and a half years. We sat down together last November, the first part of November, and we mapped out a schedule for completing this matter, and at this time we fixed the date for final hearing, April 10, 1980. We had been working to that date. We have, all of us, planed to finish this case up on that date, and on March 31st we get a Petition or Motion by the Defendant, Mrs. Schlessinger, asking that we continue the case.

She has filed with her Motion two letters. They are

from a Doctor Robert L. Watson, who is apparently a Colonel in the medical corp of the United States Army. His letterhead will indicate he is stationed at Walter Reed Army Medical Center, Washington, D.C., but he indicates that he is not treating her as a military dependent. He says in his letter of March 26, 1980, she is not authorized military medical care, but I have undertaken to treat her because my interest and experience in treating patients with chronic pain syndrome.

Apparently, he is doing some private practice on the side, and he had taken her as a patient to treat her for a chronic pain.

Now, he indicates in his letter that this pain -- she has suffered this pain over the years, and if it is chronic, it will probably continue for years. He asked for a continuance of at least 60 to 90 days. He gives us no assurance to when she will be able to come to trial. Actually, as I understand his letter, what she is suffering from is arthritis, which is a common ailment, which many people suffer from. I had

a secretary that suffered from arthritis in her hands, and she worked on a typewriter for years, although she was suffering from presevere arthritis. People can tolerate those things.

He says she needs -- apparently she went to see him about two weeks before he wrote the letter on March 26, 1980, knowing that this trial was set for April 10. She never the less went to see him about a month before that, and in my view elected this treatment. This is elective treatment, and he says that she asked to be in the hospital for one day a week, approximately six hours for one day a week, and this trial is going to be scheduled for a one or two days?

MR. RENEHAN: Two days.

THE COURT: That leaves four other weekdays for her to go in and get this treatment, if that is what she needs, but my honest feeling is that this is not an emergency treatment. This is an elective treatment. She has admittedly been shopping around for a doctor who can treat her for this pain, and she has decided about a month or three weeks prior before

this trial that she would go or undergo this series of treatments.

Now, she could have rearranged that, knowing she should give the Court some priority. We can't possibly run a docket if we are going to excuse people from trial for this kind of thing, this kind of chronic disorder that may go on and on for years.

I am going to deny the Motion for a Continuance. I point out that a Motion for Continuance in this trial would cause serious prejudice to Dr. and Mrs. Schlesinger in this case. He has a right to have this matter terminated, and as already pointed out by his lawyer, it would mean repreparing for the case, in addition to financial problems, and all sorts of inconvenience to Mr. Schlessinger. I deny the Motion.

(Whereupon, at 9:30 o'clock p.m., the above-entitled matter was concluded.)

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY
MARYLAND

LAWRENCE E. SCHLESINGER	)	
Plaintiff	)	
v.	)	Equity No. 56422
AUDREY C.S. SCHLESINGER	)	
Defendant	)	

Rockville, Maryland

April 10, 1980

Court Reporter: Laura Zwack

* * *

P R O C E E D I N G S

THE CLERK: Equity number 56422, Lawrence Schlesinger versus Audrey Schlesinger.

MR. RENEHAN: Good morning, Your Honor.

THE COURT: Good morning, Mr. Renehan, Mr. Genn.

MR. GENN: Your Honor, I have a preliminary matter.

THE COURT: All right, sir.

MR. GENN: I received this morning what I would like to have the Court have marked, a Leland Memorial record indicating that Mrs. Schlesinger is in the hospital today. On the basis of what I would renew my earlier Motion to Continue the cause, and add to it as an additional fact that certainly Mrs. Schlesinger is critical to the presentation of her case. She is really the only person who can testify to what are the few remaining issues in this case. And, given the fact that she is in the hospital I could do no more than state -- that is the document I received, Your Honor.

THE COURT: Let me see the document.

MR. GENN: I would like to have it marked, as we may, as an Exhibit in this case. I was simply informed yesterday that she would be going in the hospital. I asked that there be a document submitted to me to present to the Court, and I am doing so now.

Now, I can certainly state to Your Honor that if the Court is inclined to want to conclude with the testimony of Mr. Schlesinger today to get in as much as we can and conclude as much as we can today, I have no objection to that. I think I can handle that part of the case.

All I can state to Your Honor is that I will have my client available for her part, but, in general, I feel sufficiently familiar with this cause to do the cross-examination of Mr. Schlesinger.

THE COURT: This is all you know about it, Mr. Genn, just what information is on this xeroxed copy?

MR. GENN: That is correct. That is what I received.

THE COURT: Leland Memorial Hospital.

MR. GENN: I did ask the party who

delivered the document to try to locate Dr. Melnick because I wanted to talk to him this morning prior to coming to Court. My understanding is that Dr. Melnick was not available. My duty and obligation to the Court and my client is to present the matter to the Court.

THE COURT: Mr. Renehan.

If Mr. Genn wants to have that marked as Defendant's Motion for Continuance Exhibit No. 1? I think that would be easiest. I might also add for our record, Your Honor --

THE COURT: Just mark it the way you are supposed to mark it.

* * * * *

(E.421-423)

THE COURT: All right, well, I am going to rule. All we have in support of the Defendant's Motion for a Continuance of this trial is -- well, we had a hearing last Monday, that was about three days ago --this is Thursday-- in chambers -- and at that time some records from a Dr. Watson who was a Colonel in the U.S. Army stationed, and he is a Chief of Anesthesia and Operative Service there, who apparently has

seen Mrs. Schlesinger on the outside, not as an Army patient, said that she had arthritis, and suggested that she might have an overlay, and he was going to refer her to some psychiatrist whom we haven't heard from. Now, I denied that Motion because I took the position that it was obvious that this -- first of all, she was not hospitalized. The letters indicated that she was supposed to go in the hospital for about once a week for six hours a day for one day a week for six hours, and the letters indicate she had just begun this treatment from Dr. Watson two weeks before, about the middle of March. I took the position that this was elective treatment. It was a treatment for a condition that existed for a long, long time, arthritis, which is something a lot of people have and tolerate for months and years, and eventually go about their daily occupations.

I have a secretary who had severe arthritis and worked for me for years, about 17 years; typed even though she had arthritis in the fingers. I took the position this was a long previously existing condition.

That she knew months ago that the trial was set for today, and that she had elected to take this treatment. It was elective treatment. It was not emergency treatment. She could have arranged to have the treatment some other time even if it would interfere. I did not see it would interfere because if she had only had to report one day, she could arrange to report other than today, the trial date.

Now, of course, all we have for the renewal of this Motion to Continue on the trial date, all we have is a xeroxed copy of some papers purporting to be from Leland Memorial Hospital, purporting to be an admitting record, which, if believed, would indicate she turned herself in to the hospital yesterday evening or late afternoon at a quarter of five---that is to Leland Memorial Hospital in Riverdale, Maryland--not for any arthritis condition or emotional overlay as previously -- in accordance with her previous contention, but because of something called dehydration. So, the Rules spell out specifically what has to be done or what should

be done in order to obtain a continuance where there is a missing witness. That rule, I take it, is for the protection of the Court to safeguard the Court against being duped or misled by litigants simply for some reason or another do not want to have to litigate. They want a continuance for reasons best known to themselves. There has been virtually no compliance with Rule 527, and so I am going to deny the Motion for a Continuance.

The Rules are meant to be complied with, and the Defendant has missed by a country mile complying with Rule 527 in this case.

We will proceed.

* * *

(COPY OF HOSPITAL ADMISSION EXHIBIT DEF. #1)

SCHLESINGER, AUDREY C. -- Rm. #312A -- $130.00 per diem

8618 20th Ave., Adelphi, MD 20783 (PG) -- 3 years

Professional Diagnosis -- Dehydration -- Age 46

Date of Birth - 8/15/33 Place of Birth - Washington, D.C.

Race - White Sex - Female Citizenship - U.S.

Attending Physician - Melnick, John, M.D.

Referring Physician - Melnick - UR- Service - SMS

S.S. No. - 579-42-0029 Marital Status - S

Home telephone - 434-0477 Date & Time of Admission 4-09-80 16:45

Father's Name - Samuel M. Smith Birthplace - PA

Mother's Full Maiden Name Kate Goldstein Birthplace - Russia (USSR)

Spouse or Nearest Relative - Harvy Botkin,
Address - 8618 20th Ave., Adelphi, MD 434-0477

Next Nearest Local Relative Or Friend -
Rabbi Harold White, Georgetown University,
625-4437 - Friend

Guarantor's Name - Audrey Schlesinger, 434-0477
Address: 20th Avenue, Adelphi, MD 20783 (Self)

Guarantor's Employer - None Medicaid 161682222330

7/78 - 6/80 Type N

Authorization To Release Information And To Pay Insurance Benefits

/s/AS/
Signature of Patient/nearest relative or guardian

SCHLESINGER AUDREY E. — THIS IS COPY OF ORIGINAL

8618 20TH AVENUE ADELPH 93132

PROVISIONAL DIAGNOSIS	AGE	DATE OF BIRTH	PLACE OF BIRTH	RACE	SEX	CITIZEN OF	TYPE ADMIT
DEHYDRATION	46	8-15-33	D C	W	F	US	EMH

ATTENDING PHYSICIAN	REFERRING PHYSICIAN	SERVICE	S.S. NO.	MARITAL STATUS M. S. W. D. SEP.	HOME TELEPHONE
MELNICK, JOHN, M.D.	MELNICK, -UR-	SMS	579420029	S	434-0477

DATE & TIME OF ADMISSION	DATE & TIME OF DISCHARGE	FORMER ADMISSION - DATE	UNDER WHAT NAME?	REPORT
4-09-80 1645				00000

PATIENT'S MAIDEN NAME	FATHER'S NAME	BIRTHPLACE	MOTHER'S FULL MAIDEN NAME	BIRTHPLACE
	SAMUEL M. SMITH	PA	KATE GOLDSTEIN	RUSSIA

PATIENT'S EMPLOYER (IF RETIRED, FROM WHAT?)	ADDRESS	TEL.	OCCUPATION	HOW LONG EMPLOYED	ANNUAL FAMILY INCOME
NONE		0000000			00000

SPOUSE OR NEAREST RELATIVE	ADDRESS	TEL.	SPOUSE'S S.S. NO.	RELATIONSHIP
HARVY BOTKIN	8618 20TH AVENUE, ADELPHI, MD	434-0477		FRIEND

NEXT NEAREST LOCAL RELATIVE OR FRIEND	ADDRESS	TEL.	RELATIONSHIP
RABBI HAROLD WHITE	GEORGE TOWN UNIVERSITY	625-4437	FRINED

GUARANTOR'S NAME	ADDRESS	TEL.	DRIVER'S LICENSE NO.	RELATIONSHIP
SCHLESINGER, AUDREY	434-0477			
8618 20TH AVENUE	ADELPHI, MD		20733	SELF

GUARANTOR'S EMPLOYER	ADDRESS	TEL.	OCCUPATION	HOW LONG EMPLOYED
NONE			NONE	

INSURANCE CO	ADDRESS	CONTRACT NO.	CODE	EFFECTIVE DATE
MEDICAID		0000000000		000000
16168222330 7/78 - 6/80 TYPE N				

INFORMATION FURNISHED BY	RELATIONSHIP	SIGNATURE	DATE	ADMITTING CLERK
		X [signature]		

REMARKS:

AUTHORIZATION TO RELEASE INFORMATION AND TO PAY INSURANCE BENEFITS:

I authorize the payment of benefits of my insurance policy, if any, to be paid directly to LELAND MEMORIAL HOSPITAL for services rendered. I further authorize the release of any medical information required by my PHYSICIAN/INSURANCE CARRIER. I understand that I am responsible for charges not covered by my insurance.

X [signature] — RELATIONSHIP — DATE

SIGNATURE OF PATIENT, NEAREST RELATIVE OR GUARDIAN

X — DATE

SIGNATURE OF WITNESS

Ltr apx 39a

FINAL DIAGNOSIS (LIST IN ORDER OF IMPORTANCE) — CODE NUMBER

DEFENDANT'S EXHIBIT 1 MOTION 51422E 11-10-81

UNITED STATES CONSTITUTION

(Amendment XIV)

Section 1.
(Citizenship Rights Not To Be Abridged By States)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(THESE WERE IN EFFECT AT TIME OF TRIAL)

Rule 527, MARYLAND RULES OF PROCEDURE

Rule 527. Continuance or Postponement..... Gen'l.

a. Generally.

1. In Court's Discretion.

The court may upon motion of any party, or of its own motion, continue an action from time to time in order that a trial may be had upon the merits or as the interests of justice may require; but

2. Not Beyond Second Term Unless by Consent, for Cause, or by Rule.

No action shall be continued beyond the second term after process has been served on the defendant, unless by consent of the parties, or upon good cause shown by the party asking the continuance, or when these Rules otherwise so provide. (Art. 75, §§ 62, 71, 72.) ***

c. Absent Witness.

1. Motion for Continuance - Affidavit.

A motion for continuance or postponement on the ground that the evidence of an absent witness is wanting must be supported by an affidavit of the party making the application or of some other credible person.

2. Affidavit - Contents.

The affidavit shall show that the testimony of the absent witness is material, competent and proper, that the affiant believes that the action cannot be tried with justice to the party without such evidence,

that the affiant has used reasonable diligence to procure the same, and that the affiant has a reasonable expectation and belief that such witness can be procured within a reasonable time. The affidavit shall further show what facts the affiant believes the witness will prove, and not merely the effect of such facts in evidence, and that the affiant believes them to be true.

3. Examination by Court.

The court may examine the affiant on oath as to any of the matters alleged in the affidavit, and on what information or knowledge he believes the witness will prove what is alleged.

4. Effect of Admission.

If, upon the affidavit, or upon examination, the court is satisfied of the truth of the affidavit and that the testimony is material and competent, the court may continue or postpone the case for such time as may be deemed necessary to enable the party to procure the attendance or obtain the testimony of such absent witness, unless the opposite party will admit that the absent witness would, if present, testify to the facts alleged in the affidavit.

5. Consent to Deposition.

Where the testimony of an absent witness, whether resident or nonresident, may be taken by deposition and the opposite party will not admit that the absent witness would if present testify to the facts alleged in the affidavit, the court may grant a continuance or postponement for the purpose of taking the deposition of such absent witness.

6. Right to Impeach or Contradict.

An admission by the opposite party, or the taking of a deposition, pursuant to subsections 4 and 5 hereof, shall not deprive the opposite party of the right to impeach or contradict the testimony of the absent witness in the same manner as if such witness had been present.
(Art. 75, §§ 63-65,70; amended September 26, 1957.)

d. When New Trial Granted or Judgment Set Aside.

Where a new trial is granted or where a judgment shall be set aside for fraud or irregularity, the court may continue or postpone the action so long as it shall deem necessary for a trial thereof.
(Art. 75, § 66.)

e. Costs - By Whom Paid.

Where a continuance or postponement is granted, the court shall make such order as to costs theretofore accrued as may be just.
(Art. 75, § 73.)

(THESE WERE CHANGES AFTER TRIAL)

Rule 527. Continuance of Postponement.....
Gen'l. (Effective January, 1981)

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2. Affidavit - Contents.

The affidavit shall show that the testimony of the absent witness is material and competent; that the affiant believes that the action cannot be tried with justice to the party without such evidence; that the affiant has used reasonable diligence to procure the same, including the filing of a request for the issuance or a summons or writ to compel the attendance of the witness at least five days prior to the time the attendance of the witness if required, or the reason why a request for the issuance of a summons was not made within the time provided; and that the affiant has a reasonable expectation and belief that such witness can be procured within a reasonable time. The affidavit shall further show what facts the affiant believes the witness will prove, and not merely the effect of such facts in evidence, and that the affiant intends to call the witness at the trial of the case.

3. Examination by Court.

The court may examine the affiant on oath as to any of the matters alleged in the affidavit, and on what information or knowledge he believes the witness will prove what is alleged.

4. Effect of Admission.

If, upon the affidavit, or upon examination, the court is satisfied of the truth of the affidavit and that the testimony is material and competent, the court may continue or postpone the case for such time as may be deemed necessary to enable the party to procure the attendance or obtain the testimony of such absent witness, unless

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(Art. 75, § 73.)

Opposition

Office - Supreme Court, U.S.
FILED
NOV 18 1981
ALEXANDER L. STEVA
CLERK

No. 81-608

Supreme Court of the United States

October Term, 1981

Audrey C.S. Schlesinger, Petitioner

v.

Lawrence E. Schlesinger, Respondent

On Petition for Writ of Certiorari to the Court of Appeals of Maryland and Court of Special Appeals of Maryland

---

OPPOSITION TO

PETITION FOR A WRIT OF CERTIORARI

Bryan Renehan
BRODSKY, GREENBLATT & RENEHAN, Chartered
352 Hungerford Court
Rockville, Maryland 20850
301/424-1260
Counsel of Record for Respondent

November 18, 1981

QUESTION PRESENTED

Did the Chancellor for the Circuit Court for Montgomery County, Maryland abuse his discretion when he denied Petitioner's request for continuance of the trial of a matter that had been pending for four years, when Petitioner had known of the trial date for almost six months and had been denied a similar motion just two days before.

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STATEMENT OF THE CASE

Petitioner, Audrey Schlesinger, and Respondent, Lawrence Schlesinger, were married in September, 1973. Five months before they were married, on April 30, 1973, Petitioner, then known as Audrey Krash, and Respondent purchased, as tenants in common, real property located at 7612 Rodshu Court, Chevy Chase, Maryland. They lived together at this address until the Petitioner left the home on November 30, 1975. Thereafter, on May 18, 1977, in Equity 54677, the Circuit Court for Montgomery County, Maryland, granted the Respondent a divorce a mensa et thoro on the ground of Petitioner's desertion. The May 18, 1977 decree was later enlarged to a final decree of divorce a vinculo matrimonii on August 28, 1979.

The instant case began over four years ago. On July 16, 1976, Respondent filed a Bill

of Complaint seeking a sale of the subject property and seeking, in addition to a sale, contribution from the Petitioner for one half of all expenses paid by him, including payments towards the property's deed of trust and payments for taxes, insurance and repairs.

On March 10, 1977, the Court appointed a trustee to sell the property and deposit the proceeds into Court. A year later, the Court ratified, by Order dated March 15, 1978, the sale of the property for the sum of $263,000.00. Petitioner appealed from that Order; her appeal was dismissed by the Court of Special Appeals of Maryland on August 23, 1978. Thereafter, the Circuit Court for Montgomery County, Maryland, ordered the trustee to make a partial distribution in the amount of $40,000.00 to each party.

By memorandum dated October 19, 1979, the Chancellor specially set the matter for

trial on April 10 and 11, 1980.

Less than two weeks before the scheduled trial, the Petitioner filed a Motion to Continue the Trial Date. Her motion also sought an order staying discovery and an order extending the time for discovery responses. The basis for this motion was the alleged inability of the Petitioner to attend the trial because of medical treatment. That motion was opposed by Respondent. On April 7, 1980, the Chancellor held a hearing at which the Petitioner failed to present any testimony, affidavits or other credible evidence in support of her motion to continue. The Chancellor denied the continuance, noting that Petitioner had known about the trial since the previous October, that it had been specially set, that the alleged medical treatment was elective and that treatment was scheduled for only one day per week. Additionally, the Chancellor found that the Motion for Continuance would prejudice the

Respondent who had a right to have the matter go to trial.

On the morning of the trial, April 10, 1980, Petitioner's counsel renewed her motion for a continuance on the basis that the Petitioner had been admitted to Leland Memorial Hospital for dehydration at a quarter to five on the afternoon before trial. The Respondent again opposed the request for a continuance. The Chancellor denied the continuance. He noted:

> I took the position this (Petitioner's illness) was a long previously existing condition. That she knew months ago that the trial was set for today, and that she had elected to take this treatment. She could have arranged to have the treatment some other time even if it would interfere. I did not see it would interfere because if she had only had to report one day she could have arranged to report other than today, the trial date.
>
> Now, of course, all we have for the renewal of this Motion to Continue the Trial Date, all we have is a xeroxed copy of some papers purporting to be an admitting record, which if believed would

> indicate she turned herself in to the hospital yesterday evening or late afternoon at a quarter of five. That is to Leland Memorial Hospital in Riverdale, Maryland. Not for any arthritis condition or any emotional overlay as previously -- in accordance with her previous contention, but because of something called dehydration. So, the Rules spell out specifically what has to be done or what should have been done in order to obtain a continuance where there is a missing witness. That rule, I take it, is for the protection of the Court to safeguard the Court against being duped or misled by litigants who simply for some reason or another do not want to have to litigate. They want a continuance for reasons best known to themselves. There has been virtually no compliance with Rule 527, and so I am going to deny the Motion for Continuance.
>
> The Rules are meant to be complied with, and the Defendant has missed by a country mile complying with Rule 527 in this case. We will proceed. (Pet. Apx. 36-38)

On May 12, 1980, the Court entered a final decree ordering, inter alia, that the Respondent receive credit from the Petitioner for one half of the contributions which he had made towards the Chevy Chase property and ordering that the trustee distribute the

remaining proceeds.

On May 12, 1980, Petitioner appealed from that final order to the Court of Special Appeals of Maryland. The Court of Special Appeals affirmed the lower Court's decision and the Petitioner, undaunted by her earlier rejections by the appellate courts of Maryland, petitioned the Court of Appeals of Maryland for a Writ of Certiorari. That Writ was denied by the Maryland Court of Appeals on June 29, 1981.

The present Petition is the result of that denial.

ARGUMENT

I. THE PETITIONER'S COMPLAINT FAILS TO REACH CONSTITUTIONAL PROPORTIONS.

Rule 17 of the Supreme Court Rules states that:

> Review on Writ of Certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor.

Supreme Court Rules 17.1. The subject matter of Petitioner's complaint totally fails to meet this test, and in fact, none of the constitutional rights she alleges have been infringed. The Chancellor denied Petitioner's Motion for a Continuance because she had had notice of the trial date some six months in advance and she had completely failed to comply with the requirements of Rule 527, Maryland Rules. There is no constitutional right to confront witnesses in a civil case. The 6th Amendment confrontation right applies by its terms only to criminal prosecutions. A myriad of valid default judgments testify to the fact that the presence of a defendant at a civil proceeding adjudicating his property rights is not constitutionally required.

II. DUE PROCESS WAS NOT DENIED WHEN THE CHANCELLOR FOUND THAT THE PETITIONER HAD FAILED TO MEET THE BURDEN REQUIRED BY RULE 527 C, MARYLAND RULES AND THEREFORE DENIED HER MOTION TO CONTINUE THE TRIAL.

Due process consists of notice and an opportunity to be heard. Mulane v. Central Hanover Bank & Trust Company, 339 U.S. 306, 70 Sup. Ct. 652 (1950), Fuentes v. Shevin, 407 U.S. 671, 92 Sup. Ct. 1983 (1973). Petitioner here had ample notice; she had been notified of the specially set trial date six (6) months in advance of same. Petitioner had ample opportunity to be heard. As a matter of fact, Petitioner chose, through counsel, to vigorously participate in the trial of this action. Petitioner's counsel is charged with knowledge of the requirements of Rule 527 c, Maryland Rules, which requires,

> A motion for continuance or postponement on the ground that the evidence of an absent witness is wanting must be supported by an affidavit of the party making the application or of some other credible person.

Rule 527 c, Maryland Rules. No such affidavit was offered by counsel. The court, considering all of the facts and circumstances before it, and having had the opportunity to observe the demeanor and assess the credibility of the parties before it, determined that a continuance would not be granted. Despite Petitioner's displeasure at the outcome, there was no fundamental unfairness in this decision or in the manner in which it was made.

Counsel for Petitioner has simply failed to cite any competent authority to support the assertion (however vehement) that the right of a civil litigant to be present at the trial at which property rights are to be adjudicated is so "constitutionally impacted" as to trigger due process considerations. The case Petitioner cites as "the leading case", Arrington v. Robertson, 114 F.2d 821 (3rd Cir. 1940) deals with the right of a party or his counsel to be present when jury instructions are given. This

case hardly stands for the proposition, as Petitioner would have us believe, that it is constitutionally impermissible for a court to adjudicate property rights without the putative owner of those rights being present. The only case cited by Petitioner purporting to guarantee such a right is Hopt v. Utah, 110 U.S. 574, 4 Sup. Ct. 202 (1894), a criminal case. The Supreme Court of Oklahoma has indeed recently considered the right of a party to be present at a civil as opposed to a criminal proceeding. In the Matter of Rich, 604 P.2d 1248 (Ok. 1979) a father had been incarcerated in another state. In spite of his unavailability, the district court of Oklahoma adjudicated his children's status as deprived and terminated parental rights. The father was not present, although he was represented by counsel. The Supreme Court of Oklahoma held that there had been no due process violation, that the father's presence

at the proceeding was not the only effective means of fairly meeting the issues, and further stated, ". . . courtroom confrontation with one's civil adversary is not required either by due process or other constitutional strictures". Matter of Rich, 604 P.2d at 1253.

The Petitioner's right to confront the Respondent in the instant case, which had been pending for four (4) years, was clearly afforded her but she chose not to take advantage of same.

Having addressed the Petitioner's purported right to be present at a civil trial, the only remaining issue is whether the Chancellor abused his discretion. Petitioner was, here too, afforded her due process rights. Although Petitioner did not like the result of the trial, she fully participated, through counsel, in the trial and later tested, in each of Maryland's Appellate Courts, the result. (This included her contention that the Chancellor had abused his discretion.) The trial court examined its

final order in response to appellant's motion to reconsider; the Maryland Court of Special Appeals considered the question, as did the Maryland Court of Appeals. In each and every instance, the decision of the Chancellor was upheld. There is no need for this court to again examine the Chancellor's decision and his reasons therefor. Petitioner would have this Court further define "the area of the constitutionally allowable or permissible". Petitioner's Petition, 26. However, there are no mechanical tests for determining when the denial of a continuance is so arbitrary as to violate due process. U.S. v. 919 Acres of Land, more or less, 416 F.2d 1244 (C.A. Mich. 1969). The majority of the cases cited by counsel for petitioner deal with various factual circumstances under which courts have and have not granted continuances for various medical reasons. Surely, it would be a misuse of this court's resources to engage in a similar cataloging of medical symptomatology

CONCLUSION

The Petitioner's complaint simply does not reach constitutional proportions. No due process rights have been infringed. There needs to be an end to this litigation. Respondent has been unjustifiably dragged through each court in the State of Maryland and now to this august body because of Petitioner's litigious nature. The Circuit Court of Maryland has, to this date, not released funds belonging to Respondent because of all of this litigation generated by Petitioner. Certiorari in this case is unnecessary, frivolous, and a misuse of this Court's already overburdened resources. Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

BRODSKY, GREENBLATT
& RENEHAN, Chartered

By: _____
Bryan Renehan
352 Hungerford Court
Rockville, MD 20850
301/424-1260
Solicitors for Respondent

APPENDIX

Rule 527 c, Maryland Rules of Procedure.

c. Absent Witness.

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(Art. 75 §§63-65, 70; amended Sept. 26, 1957; Oct. 1, 1980, effective Jan. 1, 1981)